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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

vs.

FRED ARMBURG.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLARENCE W. ROWLEY,
Counsel for Respondent.

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No. 477

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vs.

FRED ARMBURG, RESPONDENT.

RESPONDENT'S BRIEF.

Statement of the Case.

This was an action of tort at common law to recover damages for personal injuries sustained on July 8, 1929, by the respondent Fred Armburg, plaintiff in the court below, a section hand in the employ of the petitioner in intrastate commerce on land, by reason of the negligence of the section foreman, a fellow servant.

At the trial the petitioner contended that the common law defence of negligence of a fellow servant,

abolished by Massachusetts Statute 1911, ch. 751, part 1, sect. 1, now General Laws, ch. 152, sect. 66, was open to it in this action and asked the Court to rule that said Section 66 violates the Commerce Clause of the Federal Constitution if it be construed as applicable to the petitioner, which is a railroad corporation engaged partly in intrastate and partly in interstate commerce.

The specific rulings requested, refused and now before this Court, are as follows:

(Request No. 11.) St. 1911, ch. 751, part 1, sect. 1, now General Laws, ch. 152, sect. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

(Request No. 14.) "Upon all the evidence the plaintiff is not entitled to recover in this action upon the following grounds and each of them:

(h) Because as a matter of law St. 1911, ch. 751, part 1, sect. 1, now General Laws, ch. 152, sect. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

The statute attacked is as follows:

G. L. Ch. 152, Sect. 66: "In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury."

After a finding in favor of the plaintiff Armburg, the case was taken to the Appellate Division of the Municipal Court, thence to the Supreme Judicial Court of Massachusetts, which courts held that the petitioner comes within the scope of the Workmen's Compensation Act in its interstate commerce only; that the Act is constitutional and does not violate the Commerce Clause of the Federal Constitution; that the petitioner, not having become a subscriber under the Workmen's Compensation Act, cannot avail itself of the fellow servant defence abolished by Sect. 66 of Ch. 152, Massachusetts General Laws, and that it is liable at common law for injuries sustained by an employee while employed in intrastate commerce, caused by the negligence of a fellow servant.

The only question presented is whether Sect. 66 abolishing the fellow servant defence violates the Commerce Clause of the Federal Constitution.

Points and Authorities.

The cause of action arose from an injury sustained by the respondent Armburg while he was employed in intrastate commerce on land. Armburg was not engaged in interstate commerce. His work had nothing to do with that part of the petitioner's business which was interstate.

"The completely internal commerce of a state, then, may be considered as reserved for the state itself."

Gibbons v. *Ogden*, 9 Wheat, 1, 195.

The jurisprudence of the state, of personal injuries received by railroad employees while engaged in intrastate commerce, is supreme and exclusive.

Wabash Railroad v. *Hayes*, 234 U. S. 86, 89, 90.
Illinois Central Railroad v. *Behrens*, 233 U. S. 374.
Taylor v. *Taylor*, 232 U. S., 363, 368.
Michigan Central Railroad v. *Vreeland*, 227 U. S. 66, 67.
Toledo, St. Louis & Western Railroad v. *Slavin*, 236 U. S. 454.
Raymond v. *Chicago, Milwaukee & St. Paul Railway*, 243 U. S. 43, 45.

The rules of law relating to the effect of negligence by a fellow servant were established by the Courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defences.

Missouri Pacific Railway v. *Mackey*, 127 U. S. 205.
Minnesota Iron Co. v. *Kline*, 199 U. S. 593.
New York Central Railroad v. *White*, 243 U. S. 188, 200.
Silver v. *Silver*, 280 U. S. 117, 122.

The Workmen's Compensation Act is an exercise of the police power of the Commonwealth.

Mountain Timber Co. v. *Washington*, 243 U. S. 219, 238, 239.

Madera Sugar Pine Co. v. *Industrial Accident Commission*, 262 U. S. 488, 501, 502.

This Court repeatedly has upheld the authority of the states to establish by legislation, departures from the fellow servant rule and other common law rules affecting the employers' liability for personal injuries to the employee.

New York Central Railroad Co. v. *White*, 243 U. S. 188.

No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.

The common law bases the employers' liability for injuries to the employee on the ground of negligence.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risks of the occupation assumed by the employee and presumably taken into account in the fixing of his wages.

The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions, respecting who should be deemed a fel-

low servant and who a vice principal or *alter ego* of the master, turning sometimes upon refined distinctions as to class and departments in the employment. It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

New York Central Railroad Co. v. *White,* 243 U. S. 188.

Laws regulating the responsibility of employers for the injury or death of employees arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned, that they properly may be regarded as coming within the category of police regulation.

Sherlock v. *Alling,* 93 U. S. 99, 103.

It is clear that the employer has no vested right to have these so-called common law defences perpetuated for his benefit and that the Fourteenth Amendment does not prevent a state from establishing a system of workmen's compensation without the consent of the employer incidentally abolishing the defences referred to.

Hawkins v. *Bleakly,* 243 U. S. 210.

The New York Compensation Act, held constitutional in *New York Central Railroad* v. *White,* 243 U. S. 188, is compulsory. Employers are obliged to provide compensation for their employees who suffer injuries arising out of their employment.

The Iowa Compensation Act, held constitutional in *Hawkins* v. *Bleakly*, 243 U. S. 210, is, like the Massachusetts Act, optional. "If the employer rejects the Act he remains liable for personal injury sustained by an employee arising out of and in the usual course of the employment and is not to escape by showing that he had exercised reasonable care in selecting competent employees in the business, or that the employee had assumed the risk, or that the injury was caused by the negligence of a co-employee."

Hawkins v. *Bleakly*, 243 U. S. 210.

The abolition of such defences is within the power of the state and the legislation cannot be condemned when that power has been qualifiedly exercised without unreasonable discrimination.

Hawkins v. *Bleakly*, 243 U. S. 210.

The essential points of the case at Bar, so far as they relate to interstate commerce, are concluded against the contention of the petitioner by the decisions in *New York Central Railroad* v. *White*, 243 U. S. 188, and *Hawkins* v. *Bleakly*, 243 U. S. 210.

The Massachusetts Workmen's Compensation Act is in no way applicable to the interstate commerce of the petitioner or its employees while engaged in that commerce.

Armburg v. *Boston and Maine Railroad*, Mass. 1931. Adv. Sheets, 1751.

The petitioner is not a subscriber under the Massachusetts Workmen's Compensation Act. It remains outside of the provisions of that Act by choice. It contends that it would be inconvenient for it to so keep its records and accounts as to separate its payroll in intrastate commerce from its interstate commerce and thus ascertain the payroll for insurance premiums under the Compensation Act, but the record discloses no evidence to sustain this contention.

"The separation of intrastate and interstate property, revenues and expenses of the company is important, not simply as a theoretical allocation to two branches of the business; it is essential to the appropriate recognition of the competent governmental authority in each field of regulation."

Smith v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 148.

The Massachusetts Workmen's Compensation Act, Statute 1911, Ch. 751, now General Laws Ch. 229, was a humanitarian measure enacted in response to the conviction that previous remedies had failed to give the measure of relief to employees for personal injuries arising out of their employment demanded by modern conditions. The main purpose of the Act was to substitute a method of accident insurance in place of the rights and liabilities established by the common law as modified by the Employers' Liability Act and other Statutes for substantially all employees save the excepted classes, to the extent that the attainment of that result was within the jurisdiction of the General

Court. Although the Act was optional and not compulsory, its general tenor disclosed a legislative aim to secure its wide adoption and use.

The statute is as broad as the jurisdiction of the Commonwealth.

Armburg v. *Boston and Maine Railroad,* Mass. 1931. Adv. Sheets 1751.

The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce.

Nogueira v. *New York, New Haven & Hartford Railroad Co.,* 281 U. S. 128.

The State law is as supreme and exclusive in its application to intrastate commerce as is the Federal law to interstate commerce. If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled and must be determined solely by the Federal law; if in the latter service, such liability rests wholly upon the State law.

St. Louis, Iron Mountain & Southern Railway v. *Hesterly,* 228 U. S. 702.

Taylor v. *Taylor,* 232 U. S. 363.

Seaboard Air Line Railway v. *Horton,* 233 U. S. 492, 501.

The record discloses no requirement that the amount of the railroad's payroll in intrastate commerce must be determined in advance. It appears that the Insurance Commissioner approves the rates of premiums charged for compensation insurance which must be paid upon the basis of the entire payroll which is the subject of insurance; that is, upon the wages actually paid for work in intrastate commerce only.

If the question of difficulty or inconvenience in determining the amount of the payroll in intrastate commerce upon which compensation insurance premiums must be paid in order that the petitioner may become a subscriber is open upon this record, then it is respectfully submitted that the amount of the payroll in intrastate commerce is not to be determined in advance but merely estimated and payment made subject to adjustment when exact figures appear.

If it is a matter of common knowledge that the amount cannot be determined in advance, then it is equally a matter of common knowledge that companies writing compensation insurance adjust the premiums after the books are audited at the close of the year so that the premiums actually paid are determined by the actual payroll as shown by the books.

So far as this record discloses, the petitioner remains outside the compensation system by choice; it has never attempted or desired to become a subscriber; it has never attempted to segregate its intrastate from its interstate commerce; it has had no difficult accounting problems; it keeps accounts showing its total payroll, its monthly payroll and compensation. Nothing

appears to show that its estimate of intrastate freight, ten or fifteen per cent of its total freight, cannot be verified from its books, or that its revenue, capital invested and expenses in its intrastate commerce cannot be easily segregated from that of its interstate commerce.

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